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No. 1[illegible]0

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
v.
J. H. GALLAGHER, J. IRA McNUTT, and Earl L. McNUTT,
Appellees.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United States for the District of Oregon

Laurence T. Harris

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No. 10620

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To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit

Come now Appellees and petition the court for a rehearing herein for the reasons and upon the grounds as follows:

By its appeal the Government presented to the court for determination two questions, which are stated in this language in the Government's brief at Page 2:

"QUESTIONS PRESENTED

> "1. Whether the judgment rendered in a condemnation case in which the parties stipulated that the value of an entire road should be determined therein, and the jury returned a verdict for the value of the entire road, precludes the owners of the road from recovering in this action for the reasonable and fair market value of the use of a portion of the road.
>
> "2. Whether the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for its use, as the reasonable and fair market value of the use of one-third of the road, rather than basing it on the reasonable charge per cubic yard for such use."

The court in the opinion handed down on March 31 has resolved the first question in Appellees' favor by a correct application of the governing law to the facts of the case, saying:

> "Since the condemnation proceeding sought title only, acquisition of the title after the services were

> performed in no way affected the right to recover the chose in action against appellant for prior services."

Our complaint has to do with the court's disposition of the second question presented.

If we correctly understand the opinion, the case is remanded with directions to make an award upon a retrial not exceeding $1,000.00 because that sum was fixed as the value of the title of the road in the prior condemnation action and is binding on the parties and establishes the limit of Appellees' claim.

If the court's holding in disposing of the first question is accepted as true, its holding with regard to the second question is erroneous. A direct, headon inconsistency exists which must be corrected.

Since the court holds in disposing of the first question presented that the claim herein asserted was not involved in the prior condemnation action and is for the Government's use of the road prior to its acquisition of title, then the amount awarded in the prior condemnation action—whether it be one dollar or a million dollars—can have no possible relation to the award to be made in this action for the reasonable and fair market value of the Government's use of the road prior to its acquisition of title.

In presenting the second question to be decided on this appeal, the Government did not claim that $1,000.00 was the outside limit of Appellees' recovery but claimed that the court erred in applying an erroneous theory based on Appellees' cost of the road *"rather than basing its award on the reasonable charge per cubic yard for such use."* (Government's brief Page 2)

There is competent evidence in the record to support an award of 10c per cubic yard, which would sustain an award of $6,802.30. If the award had been made on that basis the Government could not have complained.

This court may not substitute its judgment upon a question of fact for that of the trial court nor may it establish a limit of $1,000.00 on Appellees' recovery based upon a theory which it has already disproved in its opinion in disposing of the first question presented for determination.

Unless the original opinion is corrected, there will, of necessity, be a further appeal because on the retrial the trial court will either obey the mandate and reduce the award to below $1,000.00—in which event Appellees will prosecute an appeal—or the trial court will recognize the inconsistency in the opinion and will apply the correct measure of compensation to Appellees' claim—in which event the Government will prosecute an appeal.

We therefore urgently request that on rehearing the court correct the original opinion by eliminating the $1,000.00 limitation placed upon Appellees' claim since obviously the award in the prior condemnation action has no possible relation to Appellees' claim for the reasonable and fair market value of the Government's prior use of the road as the court correctly held in disposing of the first question presented for determination.

Respectfully submitted,
Laurence T. Harris
Koerner, Young, Swett & McColloch
James C. Dezendorf,
Attorneys for Appellees.

I, JAMES C. DEZENDORF, one of counsel for Appellees, hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

James C. Dezendorf.